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No. 419

# In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

MARY M. HUTCHINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Specification of errors to be urged | 5 |
| Reason for granting the writ | 6 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Pelzer* v. *United States*, 31 F. Supp. 770 | 6 |
| *United States* v. *Ryerson*, (C. C. A. 7th) decided July 9, 1940 | 6 |
| Statute: | |
| Revenue Act of 1932, c. 209, 47 Stat. 169: | |
| Sec. 501 (U. S. C., Title 26, Sec. 550) | 2 |
| Sec. 504 (U. S. C., Title 26, Sec. 553) | 3 |
| Sec. 1111 (U. S. C., Title 26, Sec. 1696) | 3 |




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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 13, 1940.

### OPINION BELOW

The opinion of the Board of Tax Appeals (R. 8–12) is reported at 40 B. T. A. 27. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21) is reported at 111 F. (2d) 229.

## JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered April 13, 1940[1] (R. 24). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the donor of a gift in trust is entitled under the provisions of Section 504 (b) of the Revenue Act of 1932 to one $5,000 exclusion for the entire trust or to a separate $5,000 exclusion for each of the beneficiaries of the trust.

## STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply

[1] On July 9, 1940, an order was signed by Justice Black extending the time within which to apply for a writ of certiorari to September 11, 1940.

to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

[U. S. C., Title 26, Sec. 550.]

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year. [U. S. C., Title 26, Sec. 553.]

SEC. 1111 DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

## STATEMENT

The findings of the Board of Tax Appeals may be summarized as follows (R. 9-10):

On December 30, 1935, taxpayer executed an indenture of trust which recited that she desired to convey, assign, transfer, and deliver to trustees cer-

tain real estate, personal property, and securities for the purpose of creating a voluntary living trust. The property conveyed was "all of the Grantor's right, title, interest and estate" in the described personal and real properties of a value of $144,970.34. (R. 9.)

The trustees were to hold the property in trust for the use and benefit of the taxpayer's seven children, and in their sole and absolute discretion could hold and accumulate the entire net income, interest, rents, profits, and revenues of the trust corpus, or distribute the same according to the respective interests of the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment his or her interest in the trust estate vested in the deceased beneficiary's heirs at law as determined by the law of descent and distribution of Texas. (R. 9–10.)

Paragraph six of the trust agreement provides (R. 10):

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceeding at law or in equity, and no such

> beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust any and all property was to be paid over and delivered to the then beneficiaries according to their respective interests. The trust instrument provided that the grantor should have no power to revoke the trust nor to revest in herself any part of the principal or income thereof.

In arriving at the gift tax deficiency asserted in this cause the Commissioner allowed a specific exemption of $50,000 and one exclusion of $5,000. (R. 6–7.) His action was approved by the Board of Tax Appeals. The Circuit Court of Appeals in its opinion dated April 13, 1940, reversed the decision of the Board, and held that the taxpayer was entitled to a $5,000 exclusion for each of the seven beneficiaries of the trust.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that under Section 504 (b) of the Revenue Act of 1932 taxpayer was entitled to an exclusion of $5,000 for each beneficiary of the trust

in the computation of the net amount of the gift in trust subject to tax.

### REASON FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Fifth Circuit that the beneficiaries and not the trust are the donees and that therefore a $5,000 exclusion is available for each beneficiary is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Ryerson,* decided July 9, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9576. The same question is presented in *Pelzer* v. *United States,* 31 F. Supp. 770 (C. Cls.), in which a petition for a writ of certiorari was recently filed by the Government, No. 393, present Term.

Wherefore, it is respectfully submitted that, if certiorari is granted in the *Pelzer* case, it should likewise be granted here.

FRANCIS BIDDLE,
*Solicitor General.*

SEPTEMBER 1940.

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